EXPLANATORY MEMORANDUM TO

THE CONSUMER PROTECTION (AMENDMENT) REGULATIONS 2014

2014 No. 870

1. This explanatory memorandum has been prepared by The Department for Business Innovation and Skills and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument will enable consumers to take action to seek redress when they have been a victim of a misleading or aggressive commercial practice by a trader. The instrument introduces standard remedies and an entitlement to seek damages when a consumer has fallen victim to these practices. The instrument also makes minor amendments to correct provisions in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 Regulation 9 will correct certain errors contained in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 which come into force on 13th June 2014. The amendments will come into force immediately before the 2013 Regulations come into force in order to ensure that there is no period of uncertainty. After considering the matter, the Department has decided not to apply the free issue procedure in relation to these Regulations. This is because the amendments are considered to be minor in nature and make up only a small proportion of these Regulations, which otherwise contain provisions which are not concerned with making the corrections. As set out in paragraph 3.4.13 of Statutory Instrument Practice, the Department has consulted the S.I. Registrar who considered that based on these reasons the Department has a case not to apply the free issue procedure in this instance.

4. Legislative Context

4.1 In May 2008 the Unfair Commercial Practices Directive (UCPD, Directive 2005/29/EC) was implemented into UK law by the Consumer Protection from Unfair Trading Regulations (S.I. 2008/1277) (" the CPRs"). The CPRs protect consumers from unfair commercial practices including misleading actions and aggressive practices.

4.2 A private right for consumers to seek redress was not included in the CPRs at the time of introduction. In 2006, the Government recognised that there might be merit in giving consumers these rights, but expressed concern that adopting such a right for the whole of the Directive might have unintended and adverse consequences by potentially

providing consumers with undesirable latitude to sue traders and by impacting on the law of misrepresentation.[1]

4.3 In November 2008, the Law Commission published preliminary advice on the issue.[2] Noting that in Ireland the implementation of the Directive had included a private right to damages, the advice suggested that a private right of redress could bring benefits to consumers. The potential benefits would be to clarify the law, fill in gaps and deter unfair behaviour.[3] However, the Commission also noted that introducing a new private right would have unpredictable costs, and raise difficult questions about what should happen to the current law. The Commissions thought that the best option would be to improve and simplify the current law, particularly the law of misrepresentation and duress.[4]

4.4 In February 2010, the Department for Business, Innovation and Skills asked the Law Commission and Scottish Law Commission ("the Commissions"), following consultation with relevant stakeholders, to consider reform of the laws of misrepresentation and duress and to consider the justification for the introduction of a private right of redress where there is clear evidence that consumers have suffered losses as a result of unfair commercial practices.

4.5 The instrument is being made following the recommendations of the Commissions that came out of their consultation, that the Government should introduce a private right for consumers to seek redress when they have been the victims of a misleading or aggressive commercial practice.[5] The instrument amends the CPRs to give consumers this right.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Parliamentary Under-Secretary of State for Employment Relations and Consumer Affairs, Jenny Willot MP has made the following statement regarding Human

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[1] See Department for Business, Enterprise and Regulatory Reform, *Response to the Consultation Paper on Implementing the UCPD* (December 2006) p.7.
[2] Law Commission, *A private right of redress for unfair commercial practices? Preliminary advice to the Department for Business, Enterprise and Regulatory Reform* (November 2008), available at http://lawcommission.justice.gov.uk/docs/rights_of_redress_advice1(2).pdf.
[3] See the Consumer Protection Act 2007, section 74, available at: http://www.irishstatutebook.ie.
[4] Law Commission, *A private right of redress for unfair commercial practices? Preliminary advice to BERR on the issues raised,* para 4.19.
[5] The Law Commission and the Scottish Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (March 2012), available at: http://lawcommission.justice.gov.uk/areas/misrepresentation-and-unfair-commercial-practices.htm.

Rights:

In my view the provisions of the Consumer Protection (Amendment) Regulations 2014 are compatible with the Convention rights.

7. Policy background

7.1 The policy objective is to give consumers new private rights of redress when they have been the victim of a misleading or aggressive commercial practice. The new rights include:

- Standard remedies for consumers who have been victims of a misleading or aggressive commercial practice,
- Damages for consumers if they can prove the misleading or aggressive practice caused actual loss. Damages would be available for two types of loss: (a) consequential economic losses; and/or (b) distress and inconvenience.
- A right of private redress for misleading or aggressive demands for payment (i.e. unfair debt collection).

7.2 In May 2008 the UCPD was implemented into UK law by the CPRs. A private right for consumers to take their own action for breach of the CPRs was not included at the time of introduction due to concerns that it could lead to consumers being given an *'undesirable latitude to sue traders'*.[6]

7.3 In 2009 Consumer Focus commissioned research into consumers' experience of unfair commercial practices generally.[7] The research found that between 2007 and 2009, almost two thirds of adults experienced a misleading or aggressive commercial practice. In most cases the consumer suffered no loss, however, there was evidence that some misleading and aggressive practices caused considerable loss. Consumer Focus found that in 7 per cent of cases, consumers suffered more than £500 worth of loss, and in 3 per cent of cases consumers suffered more than £1,000 worth of loss. Consumer Focus calculated that the total detriment suffered by consumers as a result of misleading and aggressive practices was around £3.3 billion. The practices most likely to lead to serious loss included sales persons overstaying their welcome, traders not who they said they were and pyramid selling.

7.4 The results from Consumer Focus are in line with the OFT's 2008 study into consumer detriment based on a survey of over 10,000 people.[8] In all, this calculated that consumers suffered £6.6 billion of consumer detriment, with 17 per cent of financial losses resulting from 'misleading claims and incorrect information'. This suggests just over £1

[6] See *Response to the Consultation Paper on Implementing the UCPD* (December 2006) p.7, available at: http://www.berr.gov.uk/files/file35750.pdf.
[7] Consumer Focus, *Waiting to be heard: Giving consumers the right of redress over Unfair Commercial Practices* (August 2008), available at: www.consumerfocus.org.uk/files/2010/12/Waiting-to-be-heard.pdf.
[8] Office of Fair Trading, *Consumer detriment: Assessing the frequency and impact of consumer problems with goods and services* (April 2008), available at: www.oft.gov.uk/shared_oft/reports/consumer_protection/oft992.pdf.

billion of consumer detriment from misleading practices. Claims involving more than £1,000 of loss were particularly difficult to resolve, with consumers reporting spending a median of 26 hours putting things right and experiencing high levels of stress, anger and frustration.

7.5 High-pressure techniques such as doorstep salesmen who refuse to leave are an increasing problem for elderly consumers. With an ageing population this problem is likely to grow. Statistics suggest that in England and Scotland there are currently 630,000 people aged 85 or over who live alone.[9] This is set to rise to 1.4 million by 2033.

7.6 The OFT completed a market study of the mobility aids market in September 2011 which documented the aggressive practices that may be used to sell mobility aids to elderly consumers.[10] The OFT estimated that the mobility aids market was worth between £430 million and £510 million. It includes mobility scooters, wheelchairs, adjustable beds, recliner chairs, stair lifts and bath hoists. The study found that more than 4,000 complaints about mobility aid sales were made to Consumer Direct in each of the three preceding years. Purchasers are often vulnerable by reason of physical and cognitive difficulties or lack of access to the internet.

7.7 The OFT found that consumers who reported high-pressure selling paid between £500 and £1,000 more on average for a mobility aid, an overpayment of around 50 to 100 per cent. They may be left with an unsuitable or unusable product, and often suffer emotional distress. The OFT commented that the impact on health and well being can be significant.

7.8 The policy will result in a number of benefits including easier complaint handling, greater consumer redress for consumers who have been subject to misleading and aggressive practices and increased consumer confidence as misleading and aggressive practices would be combated more effectivel leading to increased sales.

8. Consultation outcome

8.1 In February 2010 the Commissions were asked to consider reform of the private law on misrepresentation and duress with a view to making it easier for consumers to obtain redress. The Commissions launched a consultation in April 2011 which argued that the existing private law was overly complex and too obscure for consumers to use.[11] Respondents to the Commissions' consultation agreed that private law remedies were too

[9] These figures combine data from the Office of National Statistics with the household figures produced by the Department for Communities and Local Government and the General Register Office for Scotland. Unfortunately, the figures for Northern Ireland and Wales do not include a breakdown by age group, so are not included.

[10] Office of Fair Trading, *Mobility aids: An OFT market study* (2011), available at: www.oft.gov.uk/shared_oft/market-studies/oft1374.

[11] The Law Commission and the Scottish Law Commission, *Consumer Redress for Misleading and Aggressive Practices: A Joint Consultation Paper* (April 2011), available at: http://lawcommission.justice.gov.uk/docs/cp199_consumer_redress.pdf.

complex and confusing for consumers and as a result were rarely used. Responses from business representatives agreed that reform would be useful if it led to a simpler system for all parties.

8.2 In March 2012 the Commissions published their findings and recommendations to Government for reform in this area. The Commissions made a number of recommendations for reform to address gaps in protections and provide consumers with a right to redress when they have been a victim of a misleading or aggressive commercial practice. The Government accepted the vast majority of the recommendations and published its response together with draft regulations in August 2013. [12]

8.3 A number of comments were received in relation to the draft regulations from business, individuals and consumer representative organisations. The majority welcomed the proposals and a number of constructive comments were received on how the draft regulations could be improved. The Government has published a summary of these comments.[13]

9. Guidance

9.1 The Government will issue guidance for business and consumer organisations on the new rights before they come into force.

10. Impact

10.1 One off familiarisation costs are expected to cost business between £2.78m and £5.56m and charities and the voluntary sector between £70,000 and £140,000. Simpler complaint handling is expected to save business around £3m and charities and the voluntary sector £680,000 per year.

10.2 One off familiarisation costs for public enforcers are expected to be between £140,148 and £280,296. Savings to public enforcers in relation to complaint handling is estimated at £627,550.

10.3 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on the OPSI website.

11. Regulating small business

11.1 The legislation applies to small business.

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[12] The Government's response to the Law Commissions' report is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226626/bis-13-1107-government-response-to-consultations-on-misleading-and-aggressive-practices.pdf.

[13] https://www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers/supporting-pages/misleading-and-aggressive-selling

12. Monitoring & review

12.1 The regulations will be reviewed 3-5 years after implementation. The review will assess:

- The level of take-up of new remedies
- Whether the remedies are meeting policy objectives and are in practice feeding through to increased consumer welfare.

13. Contact

Peter Lovitt at the Department for Business Innovation and Skills Tel: 0207 215 0189 or email: peter.lovitt@bis.gsi.gov.uk can answer any queries regarding the instrument.